Supreme Court, U.S.
FILED
SEP 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D., WILLIAM B. SWAN, SHERIFF, COUNTY OF McDUFFIE, GEORGIA,

Respondents.

RESPONDENT KENNETH A. AZAR'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant
Attorney General

STEPHANIE B. MANIS
Deputy Attorney General

WILLIAM C. JOY
Senior Assistant
Attorney General

PATRICIA DOWNING
Assistant Attorney
General

PLEASE SERVE:

PATRICIA DOWNING
Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334
Telephone: (404) 656-3338

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment to the United States Constitution requires a psychiatrist at a state mental institution to continue the involuntary confinement of a patient for treatment, when in the exercise of the psychiatrist's professional judgment the patient is not mentally ill and not dangerous to himself or others.

II. Whether this Court should review a question of state law which does not implicate a federal question.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. The Eleventh Circuit's Decision That Dr. Azar Was Not Liable For His Decision To Release Cy Poss From The State Mental Institution Is Consistent With The Decisions Of This Court And Of The Circuit Courts Of Appeals 5

II. This Court Should Not Review Questions Of State Law Which Implicate No Federal Question 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Addington v. Texas, 441 U.S. 418 (1979) 8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 11

Butner v. United States, 440 U.S. 48 (1979) 11

Butts v. Economou, 438 U.S. 478 (1978)..... 7

Cooper v. Swofford, 258 Ga. 143 (368 S.E.2d 518) (1988) 7

DeShaney v. Winnebago County Department of Social Services, ___ U.S. ___, 109 S.Ct. 109 (1989)..... 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 7

O'Connor v. Donaldson, 422 U.S. 563 (1975) 8

Parham v. J.R., 442 U.S. 613 (1979) 8, 10

Pembauer v. City of Cincinnati, 475 U.S. 469 (1986) 11

Pierson v. Ray, 386 U.S. 547 (1967) 11

Roberts v. Grigsby, 177 Ga. App. 377 (339 S.Ed.2d 633) (1985) 7

Vitek v. Jones, 445 U.S. 480 (1980) 8

Wood v. Strickland, 420 U.S. 308 (1975) 7

Youngberg v. Romeo, 457 U.S. 307 (1982) 6, 8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

42 U.S.C. § 1983..... 2

O.C.G.A. § 37-3-4.....2, 10

O.C.G.A. § 37-3-41..... 3

No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D., WILLIAM B. SWAN, SHERIFF, COUNTY OF McDUFFIE, GEORGIA,

Respondents.

RESPONDENT KENNETH A. AZAR'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent Kenneth Azar, M.D., respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was brought by Petitioners Dexter C. Poss, Sr. and Mary Jo Poss, against nine defendants seeking damages in connection with the apparent suicide of their son, Dexter Poss, Jr., claiming federal jurisdiction pursuant to 42 U.S.C. § 1983. Petitioners also asserted pendent state claims. Dr. Kenneth Azar, a defendant below, is a psychiatrist at Georgia Regional Hospital at Augusta, a state facility for the mentally ill and one of the hospitals where the decedent was taken prior to his death. Plaintiffs alleged that Dr. Azar was deliberately indifferent to the decedent's serious medical needs and that Dr. Azar failed to exercise ordinary care in connection with the decision to release the decedent from Georgia Regional Hospital. In his Answer, Dr. Azar denied negligence, and he also raised the doctrine of good faith immunity in defense of the § 1983 claim. In defense of the pendent state claims he raised the state law immunity granted to physicians in connection with the discharge of patients from mental institutions. O.C.G.A. § 37-3-4.

On December 3, 1987, the court below granted Dr. Azar's Motion For Summary Judgment, finding that Dr. Azar's discharge of Mr. Poss was in good faith compliance with Georgia's admission and discharge procedures. Order at App. B to Pet. For Cert., p. 9a. Plaintiffs below then filed a supplemental brief containing an argument on the good faith immunity defense raised by Dr. Azar. The Court found that its previous Order acted to dismiss all of the claims against Dr. Azar. Order at App. C to Pet.

For Cert., pp. 17a, 18a. Plaintiffs' Motion For Reconsideration or, In the Alternative, Petition For Certification For Interlocutory Appeal was denied.

After a jury trial was held against the defendants who remained in the case, judgment for those defendants was entered. Plaintiffs appealed to the Court of Appeals for the Eleventh Circuit, which affirmed *per curiam* and without opinion. Plaintiffs then filed this Petition.

STATEMENT OF THE FACTS

On October 15, 1984, Dexter C. Poss was found asleep in his apartment by his grandmother. For the purpose of this Petition it can be assumed that he had taken twenty-five Dalmane tablets with the intention of taking his own life, as was alleged by Petitioners. Later that day, Mr. Poss was taken to Georgia Regional Hospital at Augusta for involuntary admission pursuant to the Georgia Code. O.C.G.A. § 37-3-41.

At approximately 7:00 a.m. the next morning, Dr. Azar conferred with the admitting physician about the patient, and the admitting physician told him that Mr. Poss probably did not meet the criteria which would justify further hospitalization or involuntary detention. Affidavit of Azar, attached to Defendants' Supplemental Brief In Support of Motion For Dismissal. Dr. Azar then reviewed the patient's chart including the patient's history and the mental status exam performed by the admitting physician. He then conferred with the nurse who had attended Mr. Poss and with Dr. Rojas, a resident medical doctor specializing in the field of psychiatry, who had

also examined Mr. Poss that morning. Dr. Rojas advised Dr. Azar that in his opinion the patient was not psychotic, depressed, or suicidal, nor was he overly sedated from medication, and that he did not require further involuntary hospitalization.

Dr. Azar, accompanied by Dr. Rojas, then personally examined Mr. Poss in an effort to formulate his own opinion as to the patient's condition and whether such condition justified continued involuntary hospitalization. Mr. Poss denied ever being depressed or suicidal, but stated he was doing better than he had ever done. Mr. Poss said he felt good about his job and that he had a good future ahead of him. On being questioned by Dr. Azar about having taken Dalmane tablets, Mr. Poss stated he had obtained a prescription for them from his family doctor because he worked at night and he had had trouble sleeping during the day. Dr. Azar also questioned the patient's father and was informed by both the patient and his father that there was no suicide note or any history of prior suicide attempts. The patient insisted that he wanted to be released and stated that if he were detained it would cause him to lose his job.

On completion of his examination of Mr. Poss, Dr. Azar again conferred privately with Dr. Rojas prior to making a final decision as to Mr. Poss' discharge. Dr. Azar and Dr. Rojas both concluded that Mr. Poss' condition did not justify his further involuntary retention. Mr. Poss was released and left Georgia Regional Hospital to return home accompanied by his father.

Later in the day, Mr. Poss was involved in a minor accident and was taken to jail. He was released but was

picked up and returned to jail. A short time after he was placed in a cell, a shot was heard and Mr. Poss was found with a bullet wound to the head. For the purpose of this Petition, it can be assumed that Mr. Poss had shot himself in the head with a gun he had taken on his person into the jail.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS THAT DR. AZAR WAS NOT LIABLE FOR HIS DECISION TO RELEASE CY POSS FROM THE STATE MENTAL INSTITUTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF THE CIRCUIT COURTS OF APPEALS.

A. A PSYCHIATRIST'S DECISION TO RELEASE A PATIENT FROM A STATE MENTAL INSTITUTION, WHEN IN THE PSYCHIATRIST'S JUDGMENT THE PATIENT IS NOT MENTALLY ILL NOR DANGEROUS TO HIMSELF OR OTHERS, DOES NOT VIOLATE THE PATIENT'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

Petitioners claim that Cy Poss had a constitutional right to adequate medical treatment which was violated by Dr. Azar's decision to release him from the state mental institution. Although this argument may have an initial appeal, Petitioners' position goes well beyond settled constitutional law. In fact, there is no settled constitutional right for an adult to be held in a state mental institution against his will. None of the cases cited by

Petitioners for this proposition involved a mental hospital's release decision, but rather they all involved minimal conditions of confinement or treatment.

The seminal case finding a substantive due process right to minimally adequate conditions of confinement for the mentally retarded is *Youngberg v. Romeo*, 457 U.S. 302 (1982). The right to adequate medical care found by the *Youngberg* Court, however, is not implicated in this Petition. Petitioners are not challenging the adequacy of the medical treatment their son received while at Georgia Regional Hospital at Augusta. Rather, Petitioners are challenging the decision made by Dr. Azar not to continue to involuntarily hospitalize their adult son, when in Dr. Azar's judgment their son was not mentally ill or retarded and refused to stay. That decision is primarily a medical decision, but it is fundamentally different from the decision to provide one form of treatment as opposed to another once the commitment decision has been made. Under the circumstances of this case, Petitioners had no constitutional right in their son's being involuntarily hospitalized.

Petitioners are asking this Court to significantly expand a state's duty to provide protective services to its citizens. It should be noted that this Court recently has refused to expand the state's duty to provide protective services to an individual under the Due Process Clause. *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 109 (1989). Furthermore, an expansion of the state's duty to involuntarily commit its citizens would directly and unjustifiably infringe on those citizens' liberty. This case presents no reason for the Court to impose a new duty on the states.

B. EVEN IF IT IS ASSUMED THAT A CONSTITUTIONAL RIGHT TO MEDICAL TREATMENT IS IMPLICATED BY THIS CASE, THE COURTS BELOW PROPERLY DETERMINED THAT DR. AZAR WAS PROTECTED BY OFFICIAL IMMUNITY.

Federal courts have long recognized that governmental officials have a qualified immunity from liability for damages for actions taken within the scope of their discretionary duties and responsibilities. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butts v. Economou*, 438 U.S. 478 (1978); and *Wood v. Strickland*, 420 U.S. 308 (1975). The *Harlow* Court defined the extent of the immunity as follows:

> . . . governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, supra, at 818.

In Georgia, the decision to discharge a patient from involuntary hospitalization, in addition to being a medical decision, is a state official's discretionary act within the scope of his discretionary authority. *Cooper v. Swofford*, 258 Ga. 143 (368 S.E.2d 518) (1988); *Roberts v. Grigsby*, 177 Ga. App. 377 (339 S.E.2d 633) (1985). In the case before the Court, since Dr. Azar was a state official performing a discretionary function, he is entitled to the defense of qualified immunity. At the time at issue he was a state physician and the Senior Psychiatrist on a unit at Georgia Regional Hospital at Augusta. As stated by the District Court, it is hard to imagine a position requiring

more discretion than the one being challenged here. Dr. Azar could decide to continue the involuntary hospitalization of the patient, with the massive curtailment of the patient's liberty and possible stigma to the patient entailed in that decision. *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Or Dr. Azar could discharge the patient with the risk that the patient may harm himself or others. This is exactly the type of decision to which qualified immunity applies. Thus, the lower court applied the proper standard to determine that Dr. Azar was entitled to the defense of qualified immunity. Order at App. C to Pet. For Cert.

Furthermore, the lower court applied the exact standard that Petitioners are asking that this Court apply. *Youngberg v. Romeo*, 457 U.S. 307 (1982). In defining the standard, the *Youngberg* Court emphasized that the courts must show deference to the judgment exercised by a qualified professional. *Id.* at 321. The Court relied on its previous opinion finding that the professional's judgment regarding hospitalization of the mentally retarded is presumptively valid. *Parham v. J.R.*, 442 U.S. 613 (1979). In *Parham*, a due process challenge to Georgia's procedures for admitting a child to a state mental institution, it was held that Georgia's independent medical decision-making process comported with minimum constitutional requirements. *Id.* The *Youngberg* Court stated that the reason for such deference is to minimize interference by the federal judiciary with the internal operations of the state institutions, and so that the professional personnel are not required to make their decisions in the shadow of an action for damages. *Youngberg, supra*, at 322 and 323. The

Court then enunciated the standard for reviewing such decisions as follows:

> For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

Therefore, even assuming that a Constitutional right to medical treatment were at issue in this case, then the lower court applied that standard properly to this case. Thus, there is no conflict between the decision at issue in this case and any decisions of this Court or the Circuit Courts of Appeals.

C. THE LOWER COURT WAS CORRECT IN DETERMINING THAT PETITIONERS' EVIDENCE FAILED TO RAISE A CONSTITUTIONAL ISSUE.

Petitioners urged that the lower court did not weigh the evidence properly and seeks to have this Court reweigh the evidence. This type of argument depends on the very individualized facts of each case and should not be addressed by this Court. Furthermore, the lower court was correct that Petitioners could not show that Dr. Azar failed to exercise his professional judgment in his decision to discharge Petitioners' decedent.

In making his decision Dr. Azar reviewed the available records and consulted with numerous personnel

involved with the patient's care, including the nurse, the admitting physician, and the attending physician. He personally interviewed the patient and the patient's father, at least once individually and also together. Based on this information, and in concurrence with the other two physicians, Dr. Azar formed his opinion that the patient did not meet the statutory criteria for involuntary hospitalization. In particular, Dr. Azar judged that the patient was not mentally ill and not suicidal.

The decision-making approach used by Dr. Azar is very similar to the independent medical decision-making process which is constitutionally adequate. *Parham v. J.R.*, 442 U.S. 613 (1979). Although Petitioners' experts said that Dr. Azar should have had more information on which to base his opinion, there is no settled constitutional law which would require it. Petitioners' main contention seemed to be that based on all the information available to Petitioners in hindsight, Dr. Azar's judgment was wrong. This contention simply does not raise a constitutional issue.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF STATE LAW WHICH IMPLICATE NO FEDERAL QUESTION.

Petitioners are seeking review of the lower court's decision on Petitioners' pendent state claim. In that decision the court applied Georgia's statutory immunity to find that Dr. Azar was not liable for his decision to discharge Petitioners' decedent from the hospital. O.C.G.A. § 37-3-4. This Court should not review that decision, because it involves a question of merely state

law which is of no interest to this Court. *Butner v. United States*, 440 U.S. 48, 51 (1979); *see also Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). This Court generally "accord[s] great deference to the interpretation and application of state law by the Court of Appeals," *Pembauer v. City of Cincinnati*, 475 U.S. 469, 485, N.13 (1986), because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states." *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 500 (1985).

Additionally, the lower court fully considered and correctly decided the issue. The decisions of the Georgia courts, finding that Georgia's doctrines of sovereign and governmental immunity are waived by the purchase of insurance, have never been applied and do not apply to effect a waiver of the immunity granted by a specific state statute to a physician or hospital official making a decision to discharge a patient from a mental institution.

Finally, the Petitioners seek a review of the lower court's decision denying certification of the issue to the Georgia Supreme Court. This question is not of such significance as to warrant review by this Court. Furthermore, Petitioners chose to present their claims in federal court. They should not now be heard to complain because the decision in that court was not to their liking.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant Attorney General

STEPHANIE B. MANIS 468888
Deputy Attorney General

WILLIAM C. JOY 405500
Senior Assistant Attorney General

PATRICIA DOWNING 228350
Assistant Attorney General

Please Address All
Communications To:

PATRICIA DOWNING
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3338